84-404

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN CHRISTOPHER BEALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Amendment requires that law enforcement officials have a reasonable suspicion that luggage contains contraband before exposing it to a sniff test by a trained narcotics detection dog.

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IN THE

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No.

JOHN CHRISTOPHER BEALE,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN CHRISTOPHER BEALE petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, infra, 1a-7a) is reported at 736 F.2d 1289.[1]

---

[1]The opinion as reported does not contain the modifications made by the court of appeals in its July 20, 1984 amendment to the decision. See App. B, infra.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 7a) was entered July 2, 1984 after an April 11, 1984, en banc rehearing requested by the government. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his suppression motion, Petitioner was convicted at a bench trial on stipulated facts in the United States District Court for the Southern District of California of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1) (App. A, infra, 2a). He was sentenced to concurrent terms of 30 months imprisonment on each count, to be followed by a seven-year special parole term. The court of appeals vacated the conviction on the ground that the district court had erred in denying the suppression motion. See App. C, *Beale I,* 674 F.2d 1327 (1982). Upon denial of the government's petition for rehearing, a Petition for a Writ of Certiorari was granted the government and the Supreme Court vacated the judgment and remanded, directing the court of appeals to consider the case again in light of *United States vs. Place,* 103 S.Ct. 2637 (1983). Following such reconsideration, the court of appeals issued a second opinion, vacating the conviction and remanding the case to district court. See App. D, *Beale II,* 731 F.2d 590 (1983). The government filed a petition for rehearing, and upon rehearing en banc, the court of appeals affirmed the judgment of conviction (App. A, 7a).

1. The evidence adduced at a suppression hearing showed that on April 17, 1980, Detective Rick Berks and Deputy

Larry Burk of the Broward County, Florida, Sheriff's Department were assigned to the airport narcotics interdiction detail at the Fort Lauderdale Airport.[2] While watching passengers in the vicinity of the National Airlines terminal, Detective Berks observed Petitioner and co-defendant Joseph Pulvano[3] leave a taxicab, check three pieces of luggage including a large maroon suitcase, and enter the terminal together. Upon reaching a security checkpoint inside, the two men separated and independently approached the ticket counter, but then sat together in the boarding area. After observing this behavior, Detective Berks determined that the two men had obtained separate seating assignments on a National Airlines flight to San Diego, California, with a change of planes in Houston, Texas. Detective Berks also examined the labels on the Defendant's luggage and noticed that Pulvano was watching him while he examined the bags (Tr. 6-7; Stip. 2-3).

Detective Berks then approached the two men, identified himself, and asked whether they objected to answering a few questions. When they responded that they did not, the officer explained that they were not under arrest, but asked to see their identification and inquired whether either of them had ever been arrested. Petitioner displayed a New Jersey driver's license; Pulvano, who appeared extremely nervous, stated that his identification was in his suitcase and that he had been arrested on narcotics charge six years earlier. Detective Berks then thanked them for

---

[2]Petitioner's trial consisted of the filing of a stipulation ("Stip") by the parties to certain facts developed during the suppression hearing, which was made part of the trial record, and the entry of a guilty verdict by the court on the basis of the stipulated facts (Tr. 80-82).

[3]Pulvano pled guilty to a conspiracy charge following the denial of his suppression motion (Tr. 80) and was not a party on appeal.

their cooperation and walked to the other side of the boarding area. Approximately five minutes later, Pulvano approached Detective Berks and inquired whether anything was wrong. The officer responded that there was no problem at that time (Tr. 8-10; Stip. 3).

While Detective Berks was speaking with Respondent and Pulvano, Officer Burk obtained a trained narcotics detection dog. After Detective Berks concluded his conversation with the Defendants, the officers went to the baggage loading ramp adjacent to the National Airlines ticket counter, which contained the baggage that Respondent and Pulvano had checked. The dog immediately "alerted" to Petitioner's large maroon suitcase, indicating that it contained narcotics (App. A, 2a; Tr. 10-11; Stip. 3).

The officers then requested a computer check on the two men, which revealed that Pulvano had been arrested and convicted about six months before for possession of cocaine. Detective Berks then telephoned law enforcement officials at the airports in Houston, Texas, and San Diego, California, notifying them of the events that had transpired (Tr. 12-13; Stip. 3-4). Police officers in Houston kept Petitioner and Pulvano under surveillance as they changed planes there, observing that the two men acted as though they were traveling separately (Tr. 14; Stip. 4).

When the two men deplaned in San Diego they were again observed by law enforcement officers, who noted that they did not appear to be traveling together and behaved as though they feared surveillance. As he reached the front of the terminal, Pulvano stopped at a telephone; Petitioner walked directly to a taxi without making any effort to retrieve his luggage (Tr. 49-50; Stip. 5). Police officers then approached Petitioner and asked him about his luggage. In response, he stated falsely that he was travel-

ing alone and that he had lost his claim ticket. Thereupon the officers advised him that he was under arrest and escorted him back to the terminal (Tr. 50-53; Stip. 5-6).

While Petitioner and Pulvano were under surveillance, other officers took a trained narcotics detection dog to the baggage claim area, and this dog also alerted to Petitioner's large maroon suitcase (App. A, 2a; Tr. 29; Stip. 6-7). Shortly thereafter, the officers observed Pulvano retrieve the bags from the luggage carousel and proceed toward the nearest exit. The officers then stopped him and escorted him to the airport Narcotics Task Force Office where he consented to a search of all the bags except the maroon suitcase (Tr. 30-32; Stip. 7). Subsequently, when Petitioner arrived at the Narcotics Task Force Office, the dog also alerted to the shoulder bag that Petitioner had been carrying (App. A, 2a; Tr. 63-64; Stip. 8).

Based on this information, the police obtained a search warrant from a state court judge for the two suitcases to which the dog had alerted. The ensuing search revealed that Petitioner's shoulder bag and suitcase contained contraband. (App. A, 2a; Tr. 35; Stip. 8).

2. The district court denied the motions of Petitioner and Pulvano to suppress the evidence obtained as the result of these searches (Tr. 7278). The Court rejected the contention that probable cause or even the lesser standard of reasonable suspicion, was required for the police at the Fort Lauderdale Airport either to remove the bags from the airline luggage rack or to expose them to a narcotics detection dog, explaining that "the present state of the law is that the dog search in Fort Lauderdale and here is not search under the Fourth Amendment" (Tr. 72).

3. The Court of Appeals ultimately affirmed Petitioner's conviction after en banc consideration (App. A,

1a-7a). The Court, in considering the effect of *United States v. Place,* held that a sniff of luggage by a trained narcotics detection dog does not constitute a "search" within the meaning of the Fourth Amendment. The Court of Appeals summarily dispensed with any Fourth Amendment considerations, finding no "search" had taken place, thus avoiding altogether the central issue regarding the requirement of reasonable suspicion as a standard of proof.

REASONS FOR GRANTING THE PETITION

This case presents a very important question concerning the restrictions that the Fourth Amendment should impose upon the use of specially trained dogs to assist in the detection of illegal narcotics traffic. The court of appeals' ultimate holding that the use of a trained dog to detect the presence of narcotics contained in personal luggage does not constitute a "search" within the meaning of the Fourth Amendment directly conflicts with decisions of other courts of appeals and moreoever, is contrary to well established principles of Fourth Amendment law. If permitted to stand, it will no doubt have an adverse impact against individual liberties, resulting in unlawful intrusions of individual privacy interests.

1. The panel's holding in *Beale II,* requiring prior suspicion before a detector dog may be utilized in the area of luggage, is entirely consistent with the Supreme Court's views on canine sniffs as set forth in *United States v. Place,* 103 S.Ct. 2637 (1983). Since the Supreme Court in *Place* held that reasonable suspicion was required before the luggage can be detained to be sniffed, it must naturally follow that reasonable suspicion is still necessary to conduct such a sniff, even if no "detention" were required. The Government would seek to distinguish *Beale II* from *Place* by noting that *Place* involved two separate issues

and evaluated two separate claims concerning legitimate expectations of privacy: (1) whether the seizure and detention of a traveler's luggage, located in an airport, may be effected without a warrant and on less than probable cause; and (2) if so, to what extent the seizure and detention were limited by the Fourth Amendment. *Id.* at 2639. Even though the Government would seek to rely on such distinction, Appellant would not readily concede this distinction since the matter of detention would ultimately be a question of fact that would have to be determined initially on remand. Notwithstanding any distinctions that the Government may seek to rely upon, Appellant maintains that Fourth Amendment requirements of reasonable suspicion should be applied to canine sniffs, irrespective of detention considerations. Since the duration of Appellant's detention is not revealed, under *Place,* a brief and limited detention of Appellant's luggage would have been reasonable if the initial sniffing had been warranted on the basis of reasonable suspicion.

Since the Government summarily discounts the issue of detention considerations altogether, the Government would at the same time lead this Court to believe that reasonable suspicion is therefore of no consideration as well.

It is most unfortunate that the Supreme Court utilized dictum language in stating that a canine sniff investigation "did not constitute a "search" within the meaning of the Fourth Amendment," *Id.* at 2645. This dictum in *Place* is certainly misleading in the context of its entire decision., As the court of appeals noted in *Beale II,* the term "search", however, though conceptually convenient, is not essential to the conclusion that the investigative activity is suspect to the Fourth Amendment." *See Terry v. Ohio,* 392 US 1, (1968). Thus, the most important consideration

is not the use of the non-conclusory word "search", but rather, "whether the investigative activity is the kind of intrusion a free society is willing to tolerate if unregulated by constitutional constraints." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 403 (1974); *See United States v. Solis,* 536 F.2d 880, 881 (9th Cir. 1976).

It is well settled that the essence of a search is the intrusion into an area which the owner or possessor is entitled to enjoy as private. *United States v. Bronstein,* 521 F.2d 459 (2d Cir. 1975), *cert. denied,* 424 U.S. 918, 96 S. Ct. 1121, 47 L. Ed. 2d, 324 (1976). Clearly there cannot be such intrusion where a human being can with his own senses and without physical investigation, ascertain the contents of a particular area. However, where one must rely on the use of certain aids or instruments such as binoculars, flashlights, hidden microphones, or even drug-sniffing dogs, the answer may not be as clear.

In wrestling with Fourth Amendment considerations courts have drawn distinctions between the use of certain "sense-enhancing" instruments that aid in the detection of contraband, and independent monitoring devices, such as drug-trained canines. See *United States v. Lee,* 274 U.S. 559, 563, 47 S. Ct. 746, 71 L. Ed. 1202 (1927). In conjunction with this is the level of privacy associated with the area that is searched. *United States v. Chadwick,* 433 U.S., 97 S. Ct. 2481 (1977). The necessary inquiry in the instant case, then, relates to the use of drug-trained canines for the explicit purpose of detecting contraband within personal luggage.

The Supreme Court has indeed recognized that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of

privacy." *Arkansas v. Sanders,* 442 U.S. 753, 762, 99 S.Ct. 2586, 2592, 61 L. Ed. 2d 235 (1979) (*emphasis added).* "[T]he critical factor relied on (in *Arkansas v. Sanders*) was the objective nature of the suitcase as personal luggage, i.e., the inherent nature of the container itself rather than the behavior of its owner." *United States v. Cleary,* 656 F.2d 1302, 1304 (9th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3466 (U.S. Nov. 20, 1981) (No. 81-953).

Under our fact situation, the obvious question presented is whether the detection of the odoriferous drug by the use of the sensitive and schooled canine senses employed, constitutes an invasion of Appellant's "inevitable" and "inherent" privacy interest in the contents of his luggage. Appellee would argue that a canine's detection of molecules of contraband in the air surrounding Appellant's luggage does not constitute an intrusion into his privacy interest in the content of said luggage, since there is no physical invasion of a private area.

The Supreme Court has previously held, however, that a surveillance technique may implicate the Fourth Amendment concerns even if there is no physical invasion of a private area. *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In *Katz* the warrantless bugging of a public telephone booth was found to violate the Fourth Amendment and the Court explained there that:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *** But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-352. By way of analogy, in drawing upon

Katz, this Court of Appeals recognized Appellant's legitimate expectation of privacy not only in the contents, but in the odors emanated as well. Thus, "the use of sophisticated modern mechanical or electronic devices and the frightening implications of their possible development have led to abandonment of the test of physical trespass within the protected area and broadening of protection to cover a 'reasonable expectation of privacy' " *Katz, supra* at 360.

In delivering his concurring opinion in *United States v. Bronstein, supra* at 464, Circuit Judge Mansfield stated:

> [T]he police have been permitted to enhance or magnify the human senses with the aid of instruments such as binoculars or flashlights, *** [b]ut that is not the case here where the nose being put into other's business was clearly an intrusion.

The police agents here did not smell or see any contraband, nor were their senses enhanced. The only indication that contraband was present was the action of the dog. Their own senses were replaced by the more sensitive nose of the dog in the same manner that a police officer's ears are replaced by hidden microphone in areas where he cannot otherwise hear because of the inaudibility of the sounds. The illegality of the latter practice in the absence of a search warrant for special circumstances has long been established. *Katz, supra.* In his opinion, Judge Mansfield concluded there was "no legally significant difference between the use of any X-ray machine or magnetometer to invade a closed area in order to detect the presence of a metal pistol or knife," which as been held to be a search, *United States v. Alvarado,* 495 F.2d 799 (2d Cir. 1974), "and the use of dogs to sniff for marijuana inside a private bag. Each is a non-human means of detect-

ing the contents of a closed area without physically entering into it," *Bronstein, supra* at 464. Even though neither intrusion is particularly offensive, the fact remains that each detects hidden objects without actual entry and without the enhancement of human senses. "The fact that a canine's search is more particularized and discriminate than that of the magnetometer is not a basis for a legal distinction. Judge Mansfield states that:

> [t]he important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search.
>
> If, as we have held, examination of carry-on luggage and individual passengers by a magnetometer or X-ray machine amounts to a search within prohibition of the Fourth Amendment because it discloses hidden items within areas where there is a normal expectation of privacy, *United States v. Alvarado, supra,* 495 F.2d at 802-03, then the intrusion of a sniffing dog in search of marijuana must also fall within that prohibition when directed at hidden areas where there is similarly a normal expectation of privacy" *Bronstein, supra* at 464.

In another case handed down from the Tenth Circuit, *United States v. MacDonald,* 670 F.2d 910 (1982), the Court of Appeals commented on the standard of reasonable suspicion required in utilizing a dog search in stating:

> Other courts that have addressed the substantive issue have held that so long as the police reasonably suspect criminal activity, they may temporarily detain baggage or move it to permit examination by drug-detecting dog without violating the baggage owner's Fourth Amendment interest in privacy.

United States v. West, 651 F.2d 71, 74 (1st Cir. 1981); *United States v. Viegas,* 639 F.2d 42, 54 (1st Cit), *cert. denied,* 451 U.S. 970, 101 S. Ct. 2046, 68 L. Ed. 2d 348 (1981); *United States v. Goldstein,* 635 F.2d 356, 361-62 (5th Cir.), *cert. denied,* ____ U.S. ____, 101 S. Ct. 3111, 69 L. Ed. 2d 972 (1981); *United States v. Klein,* 626 F.2d 22 (7th Cir. 1980).

Similarly, Judge Mansfield expressed the same concerns over such searches:

> [I]t is not unreasonable, where the police have reasonable grounds to suspect the presence of contraband, to permit use of an external method or device to determine whether the baggage contains contraband. On this ground I will uphold the search here. However, I will strictly limit such a search to cases where there are grounds for such a suspicion, similar to or stronger than that presented here. I would not permit a wholesale examination of all baggages in the hope that a crime might be detected.

Bronstein, supra at 465.

In the final analysis, the question of whether the use of a trained canine to detect the presence of concealed contraband is a search, must be determined by the justified-expectation-of-privacy-test applied originally in the case of *Katz v. United States, supra.* As previously stated under *Katz,* "the critical question is the kind of intrusion that a free society is willing to tolerate." That is, a valued judgment must be made whether the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints. In effect, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.

Totally unrestrained use of trained dogs, it is submitted, would not be consistent with the kind of open society to which we are committed. It would be intolerable if the police, in no way limited by the Fourth Amendment, were free to utilize dogs to undertake "a wholesale examination of all baggage in the hope that a crime might be detected" or "to roam the streets at will with trained dogs or sensor instruments, detecting the odor of marijuana and arresting persons at will as a result." *See State v. Elkins,* 47 Ohio App. 2d 307, 357 N.E. 2d 716 (1976).

As Judge Mansfield so wisely cautioned us in *Bronstein:*

> Otherwise, as the majority recognizes, the spectre of a "Big Brother" baggage search, uncurbed by the Fourth Amendment, would then loom much larger on the horizon. As more sophisticated detection devices are developed in the future, such a broad authority would be an open invitation to conduct blanket examinations, thus eroding the principles of the Fourth Amendment itself.

Thus, Petitioner maintains that canine investigations do fit within the parameters of the Fourth Amendment, including investigations not founded on articulable suspicion. As such, that Court's original holding that the sniff was a Fourth Amendment intrusion and that, as such, reasonable suspicion was required before the sniff could legally take place, is entirely consistent with the *Place* decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 80-1652
Plaintiff-Appellee,	)	
	)	OPINION
vs.	)	
	)	
JOHN CHRISTOPHER BEALE,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court for the Southern District of California
Leland C. Nielsen, District Judge, Presiding
Argued and Submitted En Banc April 11, 1984

Before: BROWNING, Chief Judge, CHOY, WALLACE, SNEED, HUG, SKOPIL, SCHROEDER, PREGERSON, POOLE, CANBY, and BOOCHEVER, Circuit Judges.

CHOY, Circuit Judge:

This appeal presents the sole question of whether a sniff of luggage by a trained narcotics detection dog constitutes a "search" within the meaning of the Fourth Amendment. We hold that it does not.

I. Background

Florida detectives observed John Beale and Joseph Pulvano check three pieces of luggage with a skycap at the National Airlines terminal at Fort Lauderdale, but then saw them separate inside the terminal and obtain their

seating assignments from the ticket counter separately. After Beale and Pulvano sat together at the boarding area, one detective approached them and questioned them briefly. Pulvano exhibited several signs of abnormal anxiety, and admitted that he had been earlier arrested on a narcotics charge.

The detectives then had "Nick," a narcotics detection dog, sniff around the suspects' luggage in the checked baggage area. Nick alerted to Beale's suitcase. From that point, the suspects were kept under surveillance until they reached San Diego. There, "Duster," another narcotics detection dog, alerted to Beale's suitcase and shoulder bag. Agents in San Diego then searched Beale's luggage pursuant to a warrant, discovering contraband.

Beale unsuccessfully moved to suppress the evidence obtained on the ground that the Fort Lauderdale sniff illegally tainted that evidence. Beale was then convicted of possession of cocaine with intent to distribute, and of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a), 846.

Beale appealed to this court, and we vacated and remanded for a determination of whether the Florida agents had articulable suspicion justifying the dog sniff by Nick. *United States v. Beale,* 674 F.2d 1327 (9th Cir. 1982). The Government petitioned for certiorari, and the Supreme Court, which had recently decided *United States v. Place,* 103 S. Ct. 2637 (1983), vacated our judgment and remanded the case to us for further consideration in light of that decision. 103 S. Ct. 3529 (1983). From the panel's unreported decision on remand from the Supreme Court, this court granted rehearing en banc. ____ F.2d ____ (9th Cir. 1984). We now affirm the judgment of conviction.

II. Discussion

In *United States v. Place,* 103 S. Ct. 2637 (1983), the Supreme Court stated:

> We have affirmed that a person possesss a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which the information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis.* We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the meaning of the Fourth Amendment.

103 S. Ct. at 2644-45 (citation omitted). Although the Court majority has been criticized for exploring this issue

because its resolution was unnecessary to the Court's decision, *see, e.g., id.* at 2651 (Brennan, J., concurring); *id.* at 2653 (Blackmun, J., concurring); 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(f), at 81 (Supp. 1984), the Court, in a recent case involving the legality of a chemical field test to disclose the presence of contraband, characterized its statement in *Place* as a holding, saying that "the Court held that subjecting luggage to a 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment." *United States v. Jacobsen,* slip op. at 13-14 (U.S. Apr. 2, 1984). Whether or not the statement in *Place* was a holding or dictum, the Supreme Court has clearly directed the lower courts to follow its pronouncement.

The essence of the Supreme Court's exposition in *Place,* as extended and applied in *Jacobsen,* is that an investigative technique is not considered to be a "search" if (1) it discloses *only* the presence or absence of a contraband item, and (2) its use "ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Place,* 103 S. Ct. at 2644.

A. Information Disclosed by the Investigative Technique

The Court in *Place* reasoned that a dog sniff is an investigative technique *sui generis* in that it "does not expose noncontraband items that otherwise would remain hidden from public view . . . ." 103 S. Ct. at 2644. The Court emphasized this point in *Jacobsen* when it stated that "the *reason* [the dog sniff in *Place*] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items."

Jacobsen, slip op. at 14 n.24. We therefore see no need to reexamine our cases holding that the use of investigative devices revealing more than the presence of contraband, albeit in limited fashion, do constitute searches. *See, e.g., United States v. Henry,* 615 F.2d 1223, 1227 (9th Cir. 1980) (holding that X-ray scan is a search because it "reveals, to a certain extent, articles the owner has chosen to conceal from view"); *United States v. Doran,* 482 F.2d 929, 932 (9th Cir. 1973) (implicitly holding that a magnetometer scan to detect the presence of metal is a search).

B. Intrusiveness of the Investigative Method

We recognize that the Court in *Place* validated only "the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine." 103 S. Ct. at 2644-45. In declaring that the dog sniff in *Place* did not constitute a search, the Court assumed that the particular method of using the dog "ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." 103 S. Ct. at 2644.

In *Place,* as well as in *Jacobsen,* the investigative technique did not require any contact with the owner of the property being investigated, as the property investigated was located in a baggage area. Here, we are not confronted with a case in which the detection dog conducted a sniff of a person rather than an inanimate object,[1] or a sniff of

[1] *See, e.g.,* Horton v. Goose Creek Independent School District, 690 F.2d 470, 479 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 3536 (1983) (holding that use of dogs to sniff students in class was a search); Loewy, *The Fourth Amendment as a Device for Protecting the Innocent,* 81 Mich. L. Rev. 1229, 1246-47 (1983) ("the very act of being

luggage that a person was carrying at the time.[2] The investigative technique applied to Beale's luggage caused "virtually no annoyance and rarely even contact with the owner of the bags, unless the [test result] is positive." *United States v. Waltzer,* 682 F.2d 370, 373 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 3543 (1983). There is no evidence that Beale himself was detained, even for a moment, due to that sniff.

We hold that the investigation of Beale's luggage in these circumstances did not interfere, in any meaningful way, with Beale's possessory interest in his luggage. We realize that the Supreme Court in *Place* equated the seizure of a traveler's luggage to seizure of his person when seizure of luggage subjects the person "to the possible disruption of his travel plans in order to remain with his luggage or arrange for its return." 103 S. Ct. at 2645 (footnote omitted). In *Place,* however, DEA agents held the suspect's luggage between a Friday afternoon and the following Monday morning. The agents never made it "absolutely clear how they [planned] to reunite the suspect and his possessions at some future time and place." 103 S. Ct. at 2645 n.8 (quoting 3 W. LaFave, *supra,* § 9.6, at 61 (Supp. 1982)). Consequently, the Court held that Place's luggage was seized.

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subjected to a body sniff by a German Shepherd may be offensive at best or harrowing at worst to the innocent sniffee") (footnote omitted).

[2] *See* Doe v. Renfrow, 451 U.S. 1022, 1026 n.4 (Brennan, J., dissenting from denial of certiorari) (noting that cases allowing dog sniffs "involved the sniffing of inanimate and *unattended* objects") (emphasis added); 1 W. LaFave, *supra,* § 2.2(f), at 84 (Supp. 1984) ("a sniff directed at objects being carried by the person is no less objectionable, especially when done in an airport corridor in circumstances amounting to a public accusation of crime.").

In contrast, Beale was not detained or otherwise inconvenienced, nor were his travel plans interfered with in the slightest, while Nick and the other Florida detectives did their work. Any interference with Beale's possession of his luggage was de minimis. *Cf. United States v. Jacobsen,* slip op. at 15 & n.28 (discussing de minimis invasions of Fourth Amendment interests); *United States v. Van Leeuwen,* 397 U.S. 249, 252 (1970) (one-day detention of packages placed in the mail not a seizure). There was thus no seizure of his property necessitating probable cause or reasonable suspicion. *See Jacobsen,* slip op. at 3 (defining a seizure of property).

III. Conclusion

The canine sniff of Beale's luggage conducted at the Fort Lauderdale Airport was not a "search" under the Fourth Amendment. Beale's motion to suppress the evidence on the ground that it was illegally tainted by the Fort Lauderdale sniff was properly denied. Accordingly the judgment of conviction appealed from is

AFFIRMED.

United States v. Beale, No. 80-1652 (en banc)

PREGERSON, Circuit Judge, dissenting:

I respectfully dissent for the reasons that Judge Ely expressed in two excellent panel opinions: *Beale I,* 674 F.2d 1327 (9th Cir. 1982), and *Beale II,* 731 F.2d 590 (9th Cir. 1983). I write further mainly to point out that the majority, in telling us that a dog sniff is not a *search,* fails to tell us what it *is.* I submit that the intruding canine nose, *Beale I,* 674 F.2d at 1334, like the intruding eye and the uninvited ear, *Katz v. United States,* 389 U.S. 347, 352 (1967), deserves a more exacting Fourth Amendment inquiry than the majority has given it.

In holding that the police may employ a trained narcotics detection dog to sniff Beale's luggage without implicating the search clause of the Fourth Amendment, the majority makes three errors. First, it denigrates the reasonable expectation of privacy that travelers retain in their luggage. Second, it fails adequately to explain how an obvious intrusion into someone's personal effects – his suitcases – is not a search. Finally, the majority never even reaches the critical question the panel faced below: whether the sniff, if not a full-blown search, nonetheless constitutes an investigatory stop triggering the more modest Fourth Amendment standards of *Terry v. Ohio,* 392 U.S. 1 (1968). I consider each matter in turn.

A. Personal Effects and the Fourth Amendment

The majority makes light of using a dog to sniff luggage for cocaine because this technique is less intrusive than having the dog sniff the person who owns the luggage. The majority also tells us that the sniff in this case caused Beale no inconvenience or embarrassment because the Florida detectives, unlike the police in *United States v. Place,* 103 S. Ct. 2637 (1983), detained neither the man nor his luggage for an appreciable length of time.

Behind this rationalization lurks the assumption that a person's privacy interest in his luggage is less important than his privacy interest in his person or home. I agree that sniffing the luggage rather than the owner is somewhat less intrusive. I disagree, however, with the premise that no intrusion at all occurs.

This is a "what you don't know, won't hurt you" approach. It permits the authorities secretly to inspect luggage whenever the owner happens to become separated from it. It thumbs its nose at the rule that "[n]o less than

one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner [by placing them in a locked suitcase] is due the protection of the Fourth Amendment Warrant Clause." *United States v. Chadwick,* 433 U.S. 1, 11 (1977). The Fourth Amendment, after all, protects from unreasonable searches and seizures "[t]he right of the people to be secure in their persons, houses, papers, and *effects.*" U.S. Const. amend. IV (emphasis added).

"[L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Arkansas v. Sanders,* 442 U.S. 753, 762 (1979). Luggage does not lose its Fourth Amendment protection simply because it is highly mobile, *see id.* at 764-65, or because it turns up in public places, *see id.* at 767 (Burger, C.J., concurring in the judgment). To the traveler away from home, the closed suitcase containing personal belongings represents one of the few bulwarks of privacy. Therefore, I cannot agree that Fourth Amendment protections are inoperative merely because the thing searched is luggage rather than the owner.

B. The Dog Sniff as a Search

The majority believes that a canine sniff does not implicate the Fourth Amendment. Again I disagree. The critical question in every Fourth Amendment case is whether the intrusion at issue is one that a free society is willing to tolerate. *United States v. Solis,* 393 F. Supp. 325, 328 (C.D. Cal. 1975), *aff'd in relevant part,* 536 F.2d 880, 881 (9th Cir. 1976); *see* 1 W. LaFave, *Search and Seizure* § 2.2(f), at 286 (1982); Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 403 (1974). I do not believe that a free society should be willing to tolerate the spectre of trained dogs randomly sniffing

private luggage to help the police determine whether someone is carrying contraband. "It would be intolerable if the police, in no way limited by the Fourth Amendment, were free to utilize dogs to undertake 'a wholesale examination of all baggage in the hope that a crime might be detected.' " 1 W. LaFave, *supra* § 2.2(f), at 286 (quoting *United States v. Bronstein,* 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring), *cert. denied,* 424 U.S. 918 (1976). Yet the majority moves in this direction.

The authorities invaded Beale's reasonable expectation of privacy in the contents of his luggage when they employed a trained dog to sniff for drugs. As Judge Ely wisely pointed out, the detectives needed the dog; they could not detect the substance by relying on their unaided senses. *Beale I,* 674 F.2d at 1333-34. When using dogs to ferret out contraband, the police are not simply walking around hoping to come across evidence of a crime. Instead, they are investigating. They are trying to find something. They are seeking evidence in hidden places. If this activity does not qualify as a "search," then I am not sure what does. The majority, in any event, offers little reasoning to back up its finding that the intrusion was not a search.

To me, there is little practical difference between employing a trained dog to sniff luggage and permitting a police officer, acting without consent or a search warrant, to view the suitcase through an x-ray machine, *United States v. Henry,* 615 F.2d 1223, 1227 (9th Cir. 1980), or simply to open it. *United States v. Bronstein,* 521 F.2d 459, 464 (2d Cir. 1975) (Mansfield, J., concurring), *cert. denied,* 424 U.S. 918 (1976). In each instance, the police learn about the presence or absence of particular contraband in the suitcase. The fact that, in using a trained dog, the authorities learn less information about the remaining

contents (such as clothing, toilet articles, and books) matters little if the information leads to the same result — namely, detecting and exposing illicit items.

C. The Dog Sniff as a Terry Investigative Stop

Even if I were satisfied that the dog sniff at issue was not a search, I would still adhere to Judge Ely's reasoning in *Beale I* that the sniff was an invasion of privacy deserving *some* level of Fourth Amendment scrutiny. Judge Ely thought that

> what Beale sought to exclude when he locked his suitcase was not only the intruding human eye — it was also the intruding canine nose. One who reposes his personal effects, including contraband, in a locked suitcase is surely entitled to assume that a trained canine will not broadcast its incriminating contents to the authorities.

Beale I, 674 F.2d at 1334 (footnote and citations omitted).

But despite finding that Beale retained an expectation of privacy against having the contents of his suitcase "broadcast" to the police, Judge Ely still would not have required the authorities to establish full probable cause to conduct the dog sniff. Instead, he would have required only that the officers establish a " 'founded' " or " 'articulable' " suspicion of crime under the standards set out in *Terry v. Ohio,* 392 U.S. 1, 20-27 (1968). *Beale I,* 674 F.2d at 1335. As Judge Ely explained in *Beale II:*

> Rather than follow an illogical approach of ignoring the source of the judicial authority to establish reasonable restraints on canine investigations, we think it infinitely more sensible to recognize that the scope of the Fourth Amendment encompasses this investigative technique.

> Moreover, the restraint adopted here is the eminently reasonable one of simply requiring that before using a trained dog to investigate the very private contents of personal luggage for evidence of crime, the police have *some articulable reason,* not necessarily amounting to probable cause, to suspect that the luggage may contain contraband.

Beale II, 731 F.2d at 595-96 (emphasis in original).

The majority, however, has chosen the illogical approach. It has not explored whether the canine investigation, if not a "search" requiring probable cause, is nonetheless a lesser "intrusion" or "invasion" subject to some modicum of Fourth Amendment protection.

The majority's all-or-nothing approach to awarding Fourth Amendment protection suffers from three defects. First, it completely removes the judiciary's responsibility for supervising limited invasions of Fourth Amendment rights. *See, e.g., Johnson v. United States,* 333 U.S. 10, 14 (1948) (discussing importance of a neutral authority passing on reasonableness of search warrants). The police need no longer justify to a neutral magistrate their plans to use trained dogs — either before the sniff at a probable cause hearing, or afterward during a suppression hearing. The authorities are free, on the basis of hunches and guesses, to employ dogs to sniff personal luggage for the purpose of detecting contraband.

Second, the majority overlooks circumstances in the Supreme Court's key decisions indicating that the intermediate *Terry* approach is appropriate in dog sniff cases. *Place,* for example, did not hold that the Government did not need to provide *any* basis for conducting the sniff. Instead, *Place* held that the authorities could briefly detain

luggage based on an articulable suspicion that the owner was a drug courier. *See* 103 S. Ct. at 2644. This inquiry preceded any discussion about whether the authorities could then employ a canine sniff. *Id.* Relying on these facts, Judge Ely simply held the Government to the modest burden of articulating a reasonable suspicion. He correctly reasoned that such suspicion is present when the suitcase owner fits the drug courier profile that narcotics agents commonly use to identify drug smugglers. In so doing, Judge Ely recognized both the Government's *Terry*-type need to conduct flexible, on-the-spot investigations, and society's interest in avoiding random and capricious intrusions into travelers' luggage and personal effects.

Third, the majority all too readily forfeits what little Fourth Amendment protection might still obtain in this developing area of police work. The reasonable suspicion standard is already easy to meet. If courts fail to hold the authorities to even this low threshold of reasonableness, then the Fourth Amendment will no longer offer the protection against arbitrary authority that the Framers insisted on.

Justice Douglas worried about the "powerful hydraulic pressures" that bear on courts to water down constitutional guarantees. *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting). I fear that with today's decision, the majority has ventured beyond watering down Fourth Amendment protections. Instead, in a new category of cases, it has defined them out of existence.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 80-1652
Plaintiff-Appellee,	)	
	)	OPINION
vs.	)	
	)	
JOHN CHRISTOPHER BEALE,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: BROWNING, Chief Judge, CHOY, WALLACE, SNEED, HUG, SKOPIL, SCHROEDER, PREGERSON, POOLE, CANBY, and BOOCHEVER, Circuit Judges.

The Opinion in this case is amended as follows:

On page 2, lines 25-27, change the sentence beginning with "From the panel's" to the following:

> From the panel's decision on remand from the Supreme Court, 731 F.2d 590 (9th Cir. 1983), this court granted rehearing en banc. 728 F.2d 411 (9th Cir. 1984).

On page 4, lines 14-16, replace all material on those lines with the following:

> The essence of the Supreme Court's expositions in *Place* and *Jacobsen,* which we apply here, is that the investigative technique employed here is not considered to be a "search" since

On page 5, lines 6-7, change "do constitute searches" to "does constitute a search."

APPENDIX C

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

No. 80-1652

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

JOHN CHRISTOPHER BEALE,
DEFENDANT-APPELLANT.

Argued and Submitted April 9, 1981.

Decided April 22, 1982.

Appeal from the United States District Court for the Southern District of California.

Before ELY, FLETCHER, and REINHARDT, Circuit Judges.

ELY, *Circuit Judge:*

This case, an appeal from a conviction of possession with intent to distribute and conspiracy to possess with intent to distribute a controlled substance, raises important constitutional issues relating to the application of Fourth Amendment rubric to the Government's use of trained canines to detect illegal substances not subject to perception by the unaided human senses. Because we hold that the use of trained canines in this case was improper absent a showing of "founded suspicion," we vacate and remand.

FACTS

As apellant Beale was convicted in a bench trial on stipulated facts, we consider the facts, as stipulated and as

adduced at the suppression hearing, to be undisputed. The following rendition is gleaned from the trial "record," in the light most favorable to the Government. *See United States* v. *Nelson,* 419 F.2d 1237, 1241 (9th Cir. 1969).

On April 17, 1980, Detective Rick Berks of the Broward County Sheriff's Department was assigned to the airport detail at the Fort Lauderdale (Florida) Airport. This detail, which Detective Berks had performed for at least two years, is responsible for the "interdiction" or interception of narcotics contraband passing through the airport. Also on duty were Deputy Sheriff Larry Burk and a trained canine, "Nick."

Berks observed two male caucasians, subsequently identified as John Beale and Joseph Pulvano, exit a taxicab in front of the National Airlines terminal. Beale and Pulvano checked three pieces of luggage with a "skycap" and then entered the terminal together. Upon reaching a security checkpoint inside, they separated and obtained their seating assignments from the ticket counter independently. They both possessed first-class tickets to San Diego, with a change of planes in Houston. Berks ascertained that Beale's suitcase bore an identification tag indicating a New Jersey address. After separately departing from the ticket counter, Beale and Pulvano entered the National Airlines boarding area and sat down together.

Detective Berks, suspicious of the foregoing behavior,[1]

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[1]Berks, based on his expertise in airport-related narcotics cases, believed that the subjects' conduct in separating upon entering the airport terminal, obtaining separate seat assignemnts, and looking about furtively, and their destination – a known center of drug traffic – gave rise to an inference that they were drug couriers. *See generally United States v. Mendenhall,* 466 U.S. 544, 563-65, 100 S.Ct. 1870, 1878-80, 64 L.Ed.2d 497 (1980) (Powell, J., concurring). *But see Reid v. Georgia,* 448 U.S. 438, 440-41, 100 S.Ct. 2752, 2753-54, 65 L.Ed.2d

approached Beale and Pulvano, identified himself, explained that they were not under arrest, and requested that they answer a few questions and produce some identification. Beale complied, producing his New Jersey driver's license. Pulvano, who appeared very nervous, stated that his identification was in his luggage, which he had just checked. Berks then asked the pair if they had ever been arrested. Pulvano said he had been arrested six years earlier on a narcotics charge. Berks thanked them for their cooperation and walked away. About five minutes later, Pulvano walked over to Berks and inquired if anything was wrong. Berks told Pulvano, who exhibited signs of abnormal anxiety – trembling hands, cracking voice, palpable agitation – that there was no problem at that time.

Berks proceeded to the baggage area, where he and Deputy Burk had "Nick" sniff or smell the vicinity of the suspects' bags. "Nick," an experienced and reliable drug detector, "alerted" on Beale's suitcase. As Beale and Pulvano had already boarded their flight to Houston, Berks contacted the Houston Police Department's airport detail and ran a computer check on the pair. Pulvano, the computer check revealed, had been arrested and convicted of possessing a large quantity of cocaine in an Atlanta airport approximately six months earlier.

Police officers in Houston kept the suspects and their luggage under surveillance as they changed planes in Houston. They deplaned separately and appeared as though they were not traveling together; they were the last

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890 (1980) (per curiam). We express no view, however, whether these facts, later circumstances, and "rational inferences" therefrom rose to the level of "founded" or "articulable" suspicion. See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *United Staes v. Post*, 607 F.2d 847, 849-51 (9th Cir. 1979). This detemrination should be made in the first instance by the District Court on remand.

two passengers to board the plane to San Diego. Agents in San Diego were alerted to the suspects' arrival.

When the plane arrived in San Diego, Beale and Pulvano, each carrying a shoulder bag, exited quickly and behaved warily. Beale did not go to the luggage area to claim his bags, but left the terminal and immediately attempted to board a taxicab. He was accosted by agents and, when asked about his luggage, asserted that he had lost the claim checks. While Pulvano was waiting inside the terminal at the baggage claim area, a United States Customs Service Officer and a trained canine "Duster" briefly intercepted the suspects' luggage. "Duster," an experienced and reliable narcotics detector, "alerted" on Beale's suitcase. When Pulavno retrieved the bags – including Beale's – and started to leave the airport, he too was accosted. "Duster" later "alerted" on Beale's shoulder bag.

Based on a sworn affidavit containing this information, the officers obtained a search warrant for Beale's suitcase and shoulder bag. Approximately 961 grams of cocaine were discovered in the shoulder bag and approximately 137 grams of marijuana were discovered in the suitcase.

Beale's motion to suppress the evidence obtained in these searches was denied. On the foregoing stipulated facts Beale was convicted of possession with intent to distribute and conspiracy to possess with intent to distribute a controlled substance – cocaine – in violation of 21 U.S.C. §§ 841(a)(1), 846.

ISSUES ON APPEAL

The only issue not subject to stipulation is the constitutional propriety of the principal police encounters with Beale and Pulvano, *i.e.*, their questioning in the Fort

Lauderdale Airport, the "sniffing expedition" of their luggage in Fort Lauderdale, and their ultimate arrest and the search of their bags in San Diego.

DISCUSSION

I.

[1] Beale contends that the officer's initial approach and non-custodial questioning of him and his companion constituted a "seizure" or detention under the Fourth Amendment, requiring founded suspicion or probable cause. The District Court, however, concluded otherwise[2] and we agree. The suspects' mobility was not impaired; the situation was non-coercive; Berks did not request that they follow him or otherwise alter their destination, schedule, or location; the questions were routine and brief, and in an atmosphere not dominated by law enforcement personnel; and the suspects agreed to answer Berks' queries "in a spirit of apparent cooperation."[3] *See Sibron* v. *New York,* 3982 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968); *United States* v. *Fray,* 622 F.2d 1218, 1219-21 (5th Cir. 1980) (percuriam); *United States* v. *Elmore,m* 595 F.2d 1036, 1041-42 (5th Cir. 1979), *cert. denied,* 447 U.S. 910, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980); 3 W. La Fave, Search and Seizure: A Treatise on the Fourth Amendment 48-55 (1978)

Thus, we need not consider whether "founded" or "articulable" suspicion existed at that time. *Cf. United States* v. *Mendenhall,* 466 U.S. 544, 1000 S.Ct. 1870, 64 L.Ed.2d

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[2]Reporter's Transcript at 73-74, 77.

[3]*Id.* at 8.

497 (1980); *Brown* v. *Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Adams* v. *Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Terry* v *Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States* v. *Corbin,* 662 F.2d 1066, 1068-71 (4th Cir. 1981).

II.

Beale next contends that even if the initial encounter was not an unlawful seizure, the use of the trained canine "Nick" to "conduct a sniffing expedition" of his luggage in the baggage area of the Fort Lauderdale Airport constituted an illegal search. If the "sniffing expedition" were an illegal search, the Government would face a difficult, perhaps impossible, burden of showing that this did not taint or infect the ultimate search of Beale's luggage in San Diego. *See Wong Sun* v. *United States,* 371 U.S. 471, 484-88, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963).

Unfortunately, the parties have treated the "dog sniffing" issue in absolute terms. Beale argues, for instance, that the primary issue is whether the use of "Nick" to sniff his suitcase was a search requiring probable cause. The District Court, in the suppression hearing, held that the use of trained canines in this case was not a search and, hence, that no showing of suspicion was required.[4] Similarly, the Government argues on appeal that "it is well-established that the use of trained dogs to sniff the exteriors of containers, including luggage, is not a search in

[4] *See id.* at 72 ("I think the present state of the law is that the dog search [sic] in Fort Lauderdale and here is not a search under the Fourth Amendment.").

violation of the Fourth Amendment." Brief of Appellee at 15.

Not only do these arguments oversimplify our holding in *United States* v. *Solis,* 536 F.2d 880, 882 (9th Cir. 1976), they also misapprehend the importance of a person's privacy interest in personal luggage. *See Arkansas* v. *Sanders,* 442 U.S. 753, 762, 764-65, 99 S.Ct. 2586, 2592, 2593, 61 L.Ed.2d 235 (1979); *United States* v. *Chadwick,* 433 U.S. 1, 11, 13 97 S.Ct. 2476, 2483, 2484, 53 L.Ed.2d 538 (1977). *See also United States* v. *Allen,* 644 F.2d 749 (9th Cir. 1980); *United States* v. *Homberg,* 546 F.2d 1350, 1354-55 (9th Cir. 1976) (Ely, J., dissenting), *cert. denied,* 431 U.S. 940, 97 S.Ct. 2654, 53 L.Ed.2d 258 (1977); *United States* v. *Moore,* 483 F.2d 1361, 1363-64 (9th Cir. 1973).

Focusing on the precise physical nature of the canine sniffing obscures, we believe, the underlying Fourth Amendment interests. The Government emphasizes that only the "exterior of containers" were sniffed. Likewise, the Government relies on *United States* v. *Bronstein,* 521 F.2d 459, 461-63 (2nd Cir. 1975), *cert. denied,* 424 U.S. 918, 96 S.Ct. 1121, 47 L.Ed.2d 324 (1976), to counter Beale's argument that the use of trained canines is as intrusive under the Fourth Amendment as a magnetometer. *Bronstein,* however, like the earlier *United States* v. *Fulero,* 498 F.2d 748, 749 (D.C. Cir. 1974) (per curiam), is a pre-*Chadwick* case.

We seriously doubt whether the reasoning employed in *Bronstein* and *Fulero* is still sound. In *Bronstein* the Second Circuit stated that "[t]here can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous or hazar-

dous freight compels continuing scrutiny of passengers and their impedimenta." 521 F.2d at 462. By applying *Chadwick* to transcend and limit the "automobile exception" to the warrant requirement in *Arkansas* v. *Sanders,* 442 U.S. at 763-65, 99 S.Ct. at 2592-93, the Supreme Court seems to have rejected the *Bronstein* reasoning.[5] The D.C. Circuit's characterization as "frivolous" of the *Fulero* appellant's argument that a canine's sniffing of

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[5]Moreover, it seems to us that *Bronstein's* equation of the menace of drug smuggling and use with the threat of skyjacking is logically flawed. Whatever danger drugs may pose to society, *see United States v. Mendenhall,* 446 U.S. at 561-62, 100 S.Ct. at 1881 (Powell, J., concurring), to our knowledge no one has ever hijacked or blown up an airplane with drug-type contraband. *Compare* United States v. Gumerlock, 590 F.2d 794, 796-800 (9th Cir.) (en banc), *cert. denied,* 441 U.S. 948, 99 S.Ct. 2173, 60 L.Ed.2d 1052 (1979), and *United States v. Davis,* 482 F.2d 893, 910-15 (9th Cir. 1973) (Fourth Amendment constraints on pre-boarding screening *security* searches of passengers and carry-on baggage at airports), *with United States v. Allen,* 644 F.2d at 750-52, *and United States v. Moore,* 483 F.2d at 1362-64 (Fourth Amendment constraints on *drug-motivated* searches or seizures of personal luggage "checked-through" airline or retained within airport terminal).

If the potentially "hazardous" or "dangerous" nature of a cargo is sufficient to abrogate travelers' reasonable expectation of privacy in containers being transported, the *Bronstein* approach would justify unrestricted roadblocks and vehicular searches, dragnet monitoring of domestic mail, and other unacceptable results. *"Terry* does not justify the wholesale 'frisking' of the general public in order to locate weapons and prevent future crimes." *United States v. Davis,* 482 F.2d at 908. "There is an obvious danger . . . that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime." *Id.* at 909 (footnote omitted). The increasing use of dogs, in airports and elsewhere, to detect contraband exemplifies the "powerful hydraulic pressures" to "water down constitutional guarantees." *Terry v. Ohio,* 392 U.S. at 39, 88 S.Ct. at 1888 (Douglas, J., dissenting). We must be vigilant lest we succumb to those powerful pressures. *See United States v. Johnson,* 431 F.2d 441, 452 (5th Cir. 1970) (en banc) (Godbold, J., dissenting); *cf.* note 20 *infra.*

personal luggage was an unconstitutional intrusion into the lockers seems similarly flawed. 498 F.2d at 749.

Our analysis must begin with the premise that "the Fourth Amendment protects people, not places." *Katz* v. *United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). "[M]ore particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick,* 433 U.S. at 7, 97 S.Ct. at 2481. The protection of the Fourth Amendment is invoked when the individual claiming it had a legitimate expectation of privacy in the invaded place, *Rakas* v. *Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). The Supreme Court has recognized that "luggage is a common repository for one's personal effects, and therefore is *inevitably* associated with the expectation of privacy." *Arkansas* v. *Sanders,* 442 U.S. at 762, 99 S.Ct. at 2592 (emphasis added). "[T]he critical factor relied on [in *Arkansas* v. *Sanders*] was the objective nature of the suitcase as personal luggage, *i.e.,* the inherent nature of the container itself rather than the behavior of its owner." *United States* v. *Cleary,* 656 F.2d 1302, 1304 (9th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3466 (U.S. Nov. 20, 1981) (No. 81-953).

Our inquiry, then, is whether the use of independent monitoring devices, such as drug-trained canines, to detect the presence of contraband within personal luggage[6] is an

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[6]As we stated in *United States v. Cleary,* "the term 'personal luggage' encompasses those items commonly perceived as being designed for carrying and storing personal effects or papers and which have some sort of device to keep them closed." 656 F.2d at 1304-05 (footnote omitted).

invasion of the owner's "inevitable" and "inherent" privacy interest in the contents therein.[7]

In *United States* v. *Solis,* 536 F.2d 880 (9th Cir. 1976), we avoided characterizing the use of trained canines in terms of conventional detection devices. Instead, we applied a general reasonableness standard. *See id.* at 881-83. *Solis* noted, without drawing an analogy, that:

> Generally evidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy, but is usable under doctrines of plain view or open view or the

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[7]We need not decide whether the use of trained canines to detect the contents of other containers constitutes a violation of the Fourth Amendment. *See, e.g., United States v. Van Leeuwen,* 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970) (parcels of mail); *United States v. Choate,* 576 F.2d 165, 174-80 (9th Cir.), *cert. denied,* 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978) (same); *United States v. Mackey,* 626 F.2d 684, 687 (9th Cir. 1980) (contents of paper bag); *United States v. Venema,* 563 F.2d 1003, 1006-07 (10th Cir. 1977) (rental storage locker); *United States v. Race,* 529 F.2d 12, 13-14 (1st Cir. 1976) (air cargo freight in warehouse); *Doe v. Renfrow,* 475 F.Supp. 1012 (N.D. Ind. 1979), *modified per curiam,* 631 F.2d 91 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981) (students and lockers in public schools); *Bilbrey v. Brown,* 481 F.Supp. 26 (D.C.D. Or. 1979) (same); *State v. Rogers,* 43 N.C. App. 475, 259 S.E.2d 572 (1979) (safe deposit box). It bears emphasis, however, that if canine intrusions into these areas are permitted, it must be because the intrusion was reasonable or the expectation of privacy nonexistent, not because the dog's nose did not physically invade the protected area in a trespassory sense. *See Katz v. United States,* 389 U.S. at 352-53, 88 S.Ct. at 510-11; note 20 *infra* & accompanying text.

Finally, irrespective of whether canine-sniffing of luggage at a port of entry or international border is a Fourth Amendment intrusion, there is ample authority that routine searches and inspections conducted by Customs officials at the border are *per se* reasonable. This includes the inspection of international letter mail. *United States v. Ramsey,* 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); see *United States v. Dubrofsky,* 581 F.2d 208, 211 (9th Cir. 1978).

> equivalent. Odors so detected may furnish evidence of probable cause of "most persuasive character," *Johnson* v *United States,* 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436 (1948). . . .

Id. at 881. Looking at the totality of the circumstances, we held in *Solis* that Customs Officers' use of trained "drug dogs" to sniff a semi-trailer parked on the lot of a gas station was reasonable and not a prohibited Fourth Amendment search for the following reasons: "The agents had a founded suspicion based on the partial corroboration of the informant's statements"; the semi-trailer was parked in an area open to the public; "[t]here was no invasion of the 'curtilage' "; and "[t]he investigation was not indiscriminate." *Id.* at 882.

Beale's privacy interest in the contents of his suitcase was far greater than Solis' expectation of privacy in his semi-trailer. *See Arkansas* v. *Sanders,* 442 U.S. at 761-66, 99 S.Ct. at 2591-94; *United States* v. *Chadwick,* 433 U.S. at 11, 13, 97 S.Ct. at 2483, 2484;[8] *Cardwell* v. *Lewis,* 417 U.S. 583, 589-92, 94 S.Ct. 2464, 2468-70, 41 L.Ed.2d 325 (1974); *Carroll* v. *United States,* 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). In fact, the Supreme Court has elevated personal luggage to the Fourth Amendment status accorded private residences:

> No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions [by locking them in a piece of luggage] is due the protection of the Fourth Amendment Warrant Clause.

Chadwick, 433 U.S. at 11, 97 S.Ct. at 2483.

> Whether arrested in a hotel lobby, an airport, a railroad terminal, or on a public street, as here,

[8] "[A] person's expectations of privacy in personal luggage are substantially greater than in an automobile." 433 U.S. at 13.

> the owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police.

Arkansas v. *Sanders,* 442 U.S. at 767, 99 S.Ct. at 2594 (Burger, C.J., concurring).

This distinction between *Solis* and the present case, while relevant, is not dispositive. Had Detective Berks, utilizing only his own natural senses, been able to detect the odor of controlled substances emanating from Beale's suitcase, this would not have been a Fourth Amendment intrusion. *See United States* v. *Solis,* 536 F.2d at 881. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States,* 389 U.S. at 351, 88 S.Ct. at 511.[9]

The superficially appealing analogy between the use of a canine's acute sense of smell, and, for instance, mechanical enhancement devices such as flashlights[10] or bino-

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[9]*Compare Katz v. United States,* 389 U.S. at 352, 88 S.Ct. at 512 (electronic eavesdropping device invades the reasonable expectation of privacy one has in a phone booth), *with United States v. McLeod,* 493 F.2d 1186 (7th Cir. 1974) (when telephone caller is aware of nearby third party, who overhears caller's conversation, no reasonable expectation of privacy is violated). *See generally, United States v. White,* 401 U.S. 745, 748-54, 91 S.Ct. 1122, 1124-27, 28 L.Ed.2d 453 (1971).

[10]Under particular circumstances, we have approved certain limited use of such devices. *See, e.g., United States v. Hood,* 493 F.2d 677, 680 (9th Cir.), *cert. denied,* 419 U.S. 852, 95 S.Ct. 94, 42 L.Ed.2d 84 (1974); *United States v. Walling,* 486 F.2d 229, 236 (9th Cir. 1973), *cert. denied,* 415 U.S. 923, 94 S.Ct. 1427, 39 L.Ed.2d 479 (1974); *United States v. Marin,* 444 F.2d 86, 87 (9th Cir. 1971) (citing *Marshall v. United States,* 422 F.2d 185 (5th Cir. 1970)) (use of flashlight neither validates otherwise unlawful search nor invalidates otherwise lawful search). In these cases, the sense-enhancing devices merely enabled the officers to perceive at night that which they could normally have perceived, unaided, during the day.

culars[11] is, upon reflection, inapt. A trained canine's sense of smell is more than eight times as sensitive as a human's. *See United States* v. *Solis,* 536 F.2d at 881. Moreover, the dog does not amplify its handler's perception; it is an independent detection device, alerting the officer to information he would have been utterly unable to detect with his own senses. Nick's nose did not enhance Detective Berks' senses; it replaced them.[12] *Accord, United States* v.

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[11]In *United States v. Allen,* 633 F.2d 1282, 1290 (9th Cir. 1980), *as amended,* ____ (9th Cir. April 16, 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981), we held that the use of binoculars from a hill observation site violated no reasonable expectation of privacy. In that case, however, we also validated surveillance from a hill accomplished with the naked eye. *Id.* No valid analogy, however, can be drawn between *Allen* and the case at bar. Our decision in *Allen* was premised on the necessarily reduced expectation of privacy held by the defendant because of the location of the area searched. As we stated:

> The Allen Ranch is virtually on the United States sea-coast border (citations omitted), and Coast Guard helicopters routinely traversed the nearby airspace for several reasons, including law enforcement. The residents of the Allen Ranch would, no doubt, have been aware of these routine flights and any reasonable person, cognizant of the ranch's proximity to the coastline and the Coast Guard's well-known function of sea-coast patrol and surveillance, could expect that government officers conducting such flights would be aided by sense-enhancing devices.
>
> As such, the residents could not reasonably bear a subjective expectation of privacy from the Coast Guard's airborne telephotographic scrutiny of the objects observed here, large scale modifications of the Allen Ranch landscape and barn.

[12]Since *Katz, supra,* the use of independent detection devices such as magnetometers and x-ray scans has uniformly been held to constitute a search. *See, e.g., United States v. Henry,* 615 F.2d 1223, 1227 (9th Cir. 1980) (x-ray scan); *United States v. Albarado,* 495 F.2d 799 (2nd Cir. 1974) (magnetometer). While the use of independent electronic or mechanical detection devices constitutes a search, the corol-

Bronstein, 521 F.2d at 464 (Mansfield, J., concurring); Comment, *United States* v. *Solis; Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?,* 13 San Diego L.Rev. 410, 423 (1976). Thus, the use of trained canines to monitor the contents of personal luggage cannot be analyzed as a variant of human plain view or plain smell. *Cf. United States* v. *Leazar,* 460 F.2d 982, 983-85 (9th Cir. 1972) (police officer's olfactory detection of marijuana odor in car created probable cause for arrest). *Accord, United States* v. *Johnston,* 497 F.2d 397, 398 (9th Cir. 1974); *United States* v. *Barron,* 472 F.2d 1215, 1217 (9th Cir.) (per curiam), *cert. denied,* 413 U.S. 920, 93 S.Ct. 3063, 37 L.Ed.2d 1041 (1973).

The molecules of contraband emanating from the interior of luggage are so subtle and incapable of human perception that a canine's detection of them constitutes an intrusion into the owner's privacy interest in the contents of the container. *See Hernandez* v. *United States,* 353 F.2d 624, 626 (9th Cir. 1965), *cert. denied,* 384 U.S. 1008, 86 S.Ct. 1972, 16 L.Ed.2d 1021 (1966). The "trepassory" or "physical penetration" mode of Fourth Amendment analysis was abandoned in *Katz* v. *United States* in favor of a normative "expectation of privacy" standard. 389 U.S. at

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lary is not necessarily true in the case of sense-enhancing devices. Generally, we have limited our exemption of the use of sense-enhancing devices from the strictures of the Fourth Amendment to cases in which ordinary, commercially available devices, which citizens might expect members of the general public as well as the law enforcement community to possess, are employed *and* their use occurs in a location from which the ordinary citizens might otherwise observe the property or activity. Clearly, the use of some sense-enhancing devices may constitute a search. *See, e.g., Katz,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576.

352-53, 88 S.Ct. at 511-12; *Jee Smith* v. *Maryland,* 442 U.S. 735, 740-41 n.5, 99 S.Ct. 2577, 2580 n.5, 61 L.Ed.2d 220 (1979); *United States* v. *Taborda,* 635 F.2d 131, 136-39 (2nd Cir. 1980); *United States* v. *Davis,* 482 F.2d 893, 905 (9th Cir. 1973).

To paraphrase *Katz,* what Beale sought to exclude when he locked his suitcase was not only the intruding human eye — it was also the intruding canine nose. One who reposes his personal effects, including contraband, in a locked suitcase is surely entitled to assume that a trained canine will not broadcast its incriminating contents to the authorities.[13] *See* 389 U.S. at 352, 88 S.Ct. at 512. *Cf. Stanley* v. *Georgia,* 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) ("Whatever may be the justifications for other statutes regulating [, *inter alia,* the sale and purchase of] obscenity, we do not think they reach into the privacy of one's own home."); *id.* at 571-72, 89 S.Ct. at 1251 (Stewart, J., concurring) (reaching same conclusion on Fourth Amendment grounds).

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[13]We agree with the Second Circuit that "analysis of the constitutional protection to be accorded to privacy expectations is [not] significantly aided by reference to the nature of the conduct involved." *United States v. Taborda,* 635 F.2d at 138 n.10.

> A person in his home has no greater, nor more reasonable, expectation that he will be observed by his neighbor when his conduct is criminal than when it is innocent. What varies with the nature of the activity is not the likelihood, but rather the consequences, of its being observed.

Id. at 139 n.10. The fact that trained canines detect *only* contraband diminishes, but does not obliterate, the nature of the intrusion. A graduated Fourth Amendment approach may not be appropriate with other forms of detection technology.

[2] However, we do not agree with Beale that the use of drug-detecting canines is identical to the use of a magnetometer, x-ray machine, or other electronic or mechanical surveillance device, invoking the full rigors of the Fourth Amendment rubric. While x-ray scans and the use of magnetometers are "searches" subject to the full requirements of the Fourth Amendment, *see United States* v. *Henry,* 615 F.2d 1223, 1227-28 (9th Cir. 1980), we find the use of drug dogs sufficiently distinct and less intrusive to warrant a different treatment.

Drug-detecting canines may be "utilized with minimal invasion of privacy." *United States* v. *Solis,* 536 F.2d at 882. "[Their use] is distinguishable from all other search activities in that there is no risk that an innocent person's privacy will be intruded upon." 1 W. La Fave, *supra,* at 387. Unlike wiretapping, which is almost inherently indiscriminate, the intruding canine nose is highly discriminate. *See Peebles, The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs,* 11 Ga.L.Rev. 75, 89 (1976). In contrast to "dragnet" detection measures, which discern all conversations, all metal objects, or all observed activity, the canine detects *only contraband.* "Any intrusion is minimal because the only information gleaned from the [canine] 'examination' is whether contraband is present. If an innocent person's suitcase were 'examined' by the canine, the handler would learn only that marijuana was not present." Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime,* 44 Fordham L.Rev. 973, 987 (1976) (footnote omitted). Properly trained canines are extremely reliable and any mistake is one of omission, favoring the suspect. When a dog is directed to approach luggage which does not contain the suspected contraband, the animal will not "alert," obviating the possibility of annoyance, inconvenience,

harassment, and humiliation associated with unproductive surveillance of other sorts. 1 W. La Fave, *supra,* at 288.[14]

[3] Therefore, we hold – consistent with the unarticulated reasoning of *United States* v. *Solis;*[15] *United States* v. *Klein,* 626 F.2d 22 (7th Cir. 1980);[16] *United States* v. *Bronstein;*[17] and *United States* v. *Fulero*[18] – that the use

[14]Our decision is expressly premised on this concept of canine reliability and on the fact that the Government must establish the dog's reliability as part of its showing to support the issuance of a warrant or a finding of probable cause. Should either of these premises prove inaccurate, the use of dogs to sniff luggage would not be condoned by the court unless all the normal prerequisites to an ordinary search were complied with.

[15]"The agents had a founded suspicion [that the semi-trailer contained marijuana]. Calling upon the dogs for further corroboration . . . as a basis for application to a magistrate for a warrant to enter the vehicle was a reasonable course of action on the part of the agents." 536 F.2d at 882.

[16] [Suspicious circumstances] coupled with the agents' previous observation of defendants and the information from the Florida deputy sheriff were not enough to establish probable cause, either for an arrest or for a search of defendants' luggage, but were certainly enough to give the agents reasonable suspicion to believe that the suitcases contained contraband. 626 F.2d at 25. "[T]here is no substantial difference between the doctrine of 'founded suspicion' . . . and the 'reasonable suspicion' test . . ." *United States v. Rocha-Lopez,* 527 F.2d 476, 477 (9th Cir. 1975), *cert. denied,* 425 U.S. 977, 96 S.Ct. 2181, 48 L.Ed.2d 802 (1976).

[17]"In view of the tip received from the airline-employee informants previously found to be reliable by the West Coast DEA agent . . . , there was ample cause for the agents to pursue the lead and to place under surveillance the fully described passengers and their luggage." 521 F.2d at 461. "I would strictly limit [canine sniffing] to cases where there are grounds for [reasonable suspicion that the baggage contains contraband], similar to or stronger than that present here, and would not permit a wholesale examination of all baggage in the hope that a crime might be detected." *Id.* at 465 (Mansfield, J., concurring).

[18]Prior to using the drug-detecting dogs, the police officer in *Fulero* had reasonable suspicion, based on the totality of circumstances, that

of a canine's keen sense of smell to detect the presence of contraband within personal luggage[19] *is* a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's "founded" or "articulable" suspicion rather than probable cause.[20] *See State* v. *Wolohan,* 23 Wash.App. 813, 598 P.2d 421 (1979) (McInturff, J., dissenting).

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the footlockers contained contraband. See 498 F.2d at 748-49. *See also People v. Lester,* 101 Cal. App.3d 613, 161 Cal. Rptr. 703, *cert. denied,* 449 U.S. 919, 101 S.Ct. 316, 66 L.Ed.2d 146 (1980); *People v. Furman,* 30 Cal. App.3d 454, 106 Cal. Rptr. 366 (1973).

[19]In the present case, the luggage sniffed was located in an airport baggage room removed from the vicinity of its owners and other travelers. There was no possibility that the dog would alert to contraband being carried on a person. Thus we do not confront the constitutional problem which would be presented if law enforcement officers sought to use highly trained canines to sniff luggage in close proximity to people. *See* last part of note 20, *infra,* and *Solis,* 536 F.2d at 883 ("There was no embarrassment to or search of the person.")

[20]To the extent that *United States v. Burns,* 624 F.2d 95, 101 (10th Cir.), *cert. denied,* 449 U.S. 954, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980); *United States v. Sullivan,* 625 F.2d 9, 12-13 (4th Cir. 1980), *cert. denied,* 450 U.S. 923, 101 S.Ct. 1374, 67 L.Ed.2d 352 (1981); and *United States v. Goldstein,* 635 F.2d 356, 360-62 (5th Cir.), *cert. denied,* 452 U.S. 962, 101 S.Ct. 3111, 69 L.Ed.2d 972 (1981), depart from this unstated rationale, we decline to follow them. As stated earlier in this opinion, after *Katz, Chadwick,* and *Arkansas v. Sanders,* it is not tenable to assert that "[t]here can be no reasonable expectation of privacy when any passenger's bags may be subjected to close scrutiny for the protection of public safety," *Sullivan,* 625 F.2d at 13, or that "the olfactory activities of a trained police dog legitimately on the premises do not constitute a search." *Burns,* 624 F.2d at 101. Nor do we agree with either the formulation or the conclusion that "the passenger's reasonable expectation of privacy does not extend to the airspace surrounding [his] luggage." *Goldstein,* 635 F.2d at 361. See note 5 *supra* & accompanying text; text accompanying notes 8-13 *supra.*

We are mindful that Professor Amsterdam might view our holding as a "sliding scale" application of Fourth Amendment principles that may gradually dilute its protections in critical respects. Amsterdam,

[4] Because the District Court apparently misconstrued *Solis* as holding that canine sniffing is not a Fourth Amendment intrusion *at all,* it did not make any factual or legal determination with respect to the Fort Lauderdale officers' quantum of suspicion. *See* Reporter's Transcript at 72-78. Rather than make this finding *de novo,* we prefer to remand the case to the District Court to make the necessary determinations. If the District Court finds that the Fort Lauderdale "sniffing expedition" was supported by articulable, founded suspicion, then the District Court would be correct in its prior ruling that "probable cause for [Beale's] arrest was established by the narcotic dog's actions in Florida, followed up by the narcotic dog alerting again in San Diego." *Id.* at 77.

If, however, the District Court finds that the Fort Lauderdale intrusion was based on a constitutionally defi-

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Perspectives on the Fourth Amendment, 58 Minn.L. Rev. 349, 393 (1974). We do not intend any dilution. The rule we adopt here sets forth a minimum level of Fourth Amendment "entitlement" In situations less pervasively regulated than airports, it may be that a person's reasonable expectation of privacy in his luggage is greater, warranting a correspondingly more protective analysis of the "intrusion" issue. And it goes without saying that the alternative to random checkpoint stops cited in *Delaware v. Prouse, i.e.,* "[q]uestioning . . . all oncoming traffic at roadblock-type stops," 440 U.S. 648 at 663, 99 S.Ct. 1391 at 1401, 59 L.Ed.2d 660, is totally unpalatable in the canine sniffing context. Nothing would invoke the spectre of a totalitarian police state as much as the indiscriminate, blanket use of trained dogs at roadblocks, airports, and train stations. *See generally Terry v. Ohio,* 392 U.S. 1, 38-39, 88 S.Ct. 1868, 1888, 20 L.Ed.2d 889 (1968) (Douglas, J., dissenting); *United States v. Bronstein,* 521 F.2d at 465 (Mansfield, J., concurring); 1 W. La Fave, *supra,* at 286. Similarly, the use of dogs to sniff people, rather than objects, is highly intrusive and is normally inconsistent with the concepts embodied in our Constitution. We would not preclude, however, the use of a trained canine who sniffs from a distance as an alternative where a more intrusive strip search or search of the body cavities is justified.

cient level of suspicion, it will have to revise its probable cause determination concerning Beale's arrest and the issuance of the search warrant in San Diego, excluding evidence tainted by the Florida dog sniffing.[21]

The judgment of conviction is therefore VACATED AND REMANDED, WITH INSTRUCTIONS.

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[21] *See Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *United States v. Cella,* 568 F.2d 1266, 1284-87 (9th Cir. 1977); note 1 *supra.*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1652

D.C. No. CR 80-277-LCN

Filed July 21, 1982

United States of America, Plaintiff-Appellee,

v.

John Christopher Beale, Defendant-Appellant.

ORDER

Amending Opinion

Before: ELY, FLETCHER, and REINHARDT, Circuit Judges

The Opinion, filed April 22, 1982, in the above-entitled case shall be amended as follows:

1. At 674 F.2d 1327, 1334 (9th Cir. 1982) [14a], second column, line 35, insert "normally" after the words "any mistake is".

2. At page 1334 [14a], second column, line 38, insert "ordinarily" after the words "the animal will".

3. At page 1334 [13a], footnote 13, second column, line 4, insert "may" after "that trained canines".

4. At page 1335 [14a], footnote 14, add a new paragraph to the footnote as follows:

> It must be emphasized that dogs, like humans and machines, are not infallible, and that, notwithstanding the optimistic views of some commentators, on occasion a narcotics dog may err.

Thus, the mere fact that a dog alerts to a suitcase, even when there is founded suspicion to allow the dog to sniff, is not necessarily ground for probable cause to open and inspect it. Knowledge that the dog is reliable is central to establishing the necessary probable cause.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 80-1652
v.	)	
	)	D.C. No. 80-0277-N
JOHN CHRISTOPHER BEALE,	)	
	)	OPINION
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Southern District of California
Leland C. Nielson, District Judge, Presiding
Argued and Submitted April 9, 1981
Resubmitted June 27,1983

Before: ELY, FLETCHER, and REINHARDT, Circuit Judges

ELY, CIRCUIT JUDGE:

On July 21, 1982, we issued an amended opinion reversing the District Court's judgment in the subject appeal. *United States v. Beale,* 674 F.2d 1327 (9th Cir. 1982) ("*Beale I*"). On June 27, 1983, the Supreme Court vacated our opinion and issued its mandate.[1] The mandate remands the cause to us and directs our "further consideration" of our opinion in the light of the Supreme Court's opinion in *United States v. Place,* 462 U.S. ____, 103 S.Ct. 2637 (1983).

[1] *United States v. Beale,* 103 S.Ct. 3529 (1983).

After careful consideration of the Supreme Court's opinion in *Place,* we conclude that this case must be remanded to the district court to permit it to determine whether the canine investigation of Beale's luggage was supported by articulable, founded suspicion.

I. Effect of the Supreme Court's Analysis in *Place* on Our Decision in *Beale I*

In *Beale I,* our holding was limited to the stipulated facts, which presented only two issues: (1) Whether a police officer's use of a trained canine, with an established record of reliability, to sniff the exterior of a traveler's luggage, located in an airport, to detect the presence of contraband, implicates the Fourth Amendment; and (2) if so, to what extent the officer's use of the canine is limited by the Fourth Amendment. We held

> that the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage is a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's "founded" or "articulable" suspicion rather than probable cause.

674 F.2d at 1335 (footnotes and emphasis omitted).

Because the district court had not made any factual determination with respect to the quantum of prior suspicion possessed by the officers who conducted the canine investigation of Beale's luggage, we remanded to allow the district court to make an appropriate finding. *Id.* at 1330, 1336.

In *Place,* the Supreme Court was presented with two entirely different Fourth Amendment issues: (1) Whether the seizure and detention of a traveler's luggage, located in an

airport, may be effected without a warrant and on less than probable cause; and (2) if so, to what extent the seizure and detention are limited by the Fourth Amendment. *See* 103 S.Ct. at 2639. In resolving these issues, the Court reasoned by analogy to *Terry v. Ohio,* 392 U.S. 1, 25-26 (1968), and balanced the importance and difficulty of the Government's task in impeding the transportation of contraband against the degree of Fourth Amendment intrusion involved in a limited detention of luggage. 103 S.Ct. at 2642-2644. The Court held that

> when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

Id. at 2644.

Drug Enforcement Administration agents had seized Place's luggage upon his arrival at New York's LaGuardia Airport and transported the luggage to New York's Kennedy Airport where, approximately ninety minutes after the initial seizure, the agents exposed the luggage to a narcotics detection dog. *Id.* at 2640. The Court concluded that the length of time for which the police detained Place's luggage exceeded the permissible scope of a detention premised, as it was, solely on reasonable suspicion. *Id.* at 2645-46. The Court upheld the Second Circuit's judgment that the evidence ultimately seized was inadmissible as the tainted fruit of the unlawful detention.[2]

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[2]*See United States v. Place,* 660 F.2d 44 (2d Cir. 1981).

In *Beale I,* questions concerning the existence, duration, and validity of a detention of Beale's luggage prior to the canine sniff were not presented in the facts as stipulated by the parties. We therefore addressed the dog sniffing question in isolation. Under *Place,* any detention incident to the sniff would be permissible if it were supported by articulable, founded suspicion and if it were not unreasonable in length and scope. *See* 103 S.Ct. at 2644. It was stipulated that Beale checked his luggage with a "skycap" at Florida's Fort Lauderdale Airport and left to board his flight. The detection dog and its handler were already at the Fort Lauderdale terminal. Agents exposed the exterior of Beale's luggage to a canine sniff during the period between the time Beale checked his bags and the time his flight took off. The duration of the detention is not revealed. Under *Place,* a brief and limited detention of Beale's luggage would have been reasonable if the initial sniffing had been warranted on the basis of reasonable suspicion.

We now turn to the only issue we decided in *Beale I:* if we assume that a canine sniff is performed in such a manner that no detention whatsoever of the luggage were required, would the Fourth Amendment demand that *any* prior suspicion exist that the luggage may have contained contraband?

In *Place,* after concluding that reasonable suspicion justified a brief detention of luggage for the purpose of a minimally intrusive investigation, the Supreme Court considered the unique nature of canine sniff investigations:

> We are aware of no other investigative procedure that is so limited, both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course

> of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine – did not constitute a "search" within the meaning of the Fourth Amendment.

103 S.Ct. at 2644-45.

We recognize that this passage is *dictum* and are aware that the Supreme Court has often remarked that its dicta are not binding. *See McDaniel v. Sanchez,* 452 U.S. 130, 141 (1981); *Kastigar v. United States,* 406 U.S. 441, 454-55 (1971), *Permian Basin Area Rate Cases,* 390 U.S. 747, 775 (1967), *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 120, 179 (1821). The *Place* dictum, however, is so recent and appears to have been so carefully considered that we feel obliged to apply it to the case at hand. We turn, then, to the careful consideration of its meaning.

After thoughtful study, we conclude that the Court's statement that a canine sniff investigation "did not constitute a 'search' within the meaning of the Fourth Amendment," 103 S.Ct. at 2645, must be read in the context of the entire decision in *Place.*

The Fifth Circuit has observed that "[t]he decision to characterize an action as a search is in essence a conclusion about whether the Fourth Amendment applies at all." *Horton v. Goose Creek Independent School District,* 690 F.2d 470, 476 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 3536 (1983). The term "search," however, though conceptually convenient, is not essential to the conclusion that the investigative activity is subject to the Fourth Amendment. *See Terry,* 392 U.S. at 19. The crucial inquiry is whether the investigative activity is the kind of intrusion a free society is willing to tolerate if unregulated by constitutional constraints. Amsterdam, *Perspectives on the Fourth*

Amendment, 58 Minn. L. Rev. 349, 403 (1974); *see United States v. Solis,* 536 F.2d 880, 881 (9th Cir. 1976). The general consensus appears to be that canine investigations are or ought to be subject to *some* limitations. In recognizing that canine investigations implicate the Fourth Amendment, *Beale I* took the stance essential to the imposition of some level of Fourth Amendment scrutiny over the procedure.

In *Place,* the Supreme Court remarked that a canine sniff was not itself a "search" only after it concluded that any detention of luggage for the purpose of performing a canine sniff investigation would implicate the Fourth Amendment. The Court indicated that such a detention would be valid only if supported by the degree of suspicion necessary to justify the investigation for the purpose of which the luggage was seized. *See* 103 S.Ct. at 2644 ("Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of [Place's] luggage for the purpose of subjecting it to the sniff test — no matter how brief — could not be justified on less than probable cause."). In concluding that a canine sniff was not a "search," the Court indicated that the Fourth Amendment imposed no more stringent requirement for performance of a canine sniff beyond the reasonable suspicion required to justify the initial detention of the luggage. We do not believe that *Place* should be read to validate a canine sniff in the absence of the reasonable suspicion required for a minimally intrusive detention of luggage, whenever fortuity makes a canine sniff feasible without any seizure of the luggage. We instead interpret *Place* to conclude that no additional suspicion is required to justify exposing luggage to a trained canine once founded or articulable suspicion has been established.

II. Review of *Beale I*

Opinions concerning the fourth amendment significance of canine investigations, rendered after *Beale's* publication, have offered no new insights into the dog sniffing question and, indeed, have perpetuated arguments that were and continue to be "short on reasoning." 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 283 (1978).[3] In an effort to demonstrate that canine investigations do not fit within the parameters of the fourth amendment, courts recite the arguments that dogs sniff only the airspace surrounding luggage in which there is no reasonable expectation of privacy,[4] that there is no legal difference between an officer's detection of a

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[3]In *United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 3543 (1983), the Second Circuit reaffirmed its ruling in *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976), an opinion which, we argued in *Beale I*, had been implicitly overruled by the Surpeme Court in *Arkansas v. Sanders*, 442 U.S. 753, 763-65 (1979). 674 F.2d at 1330-31 & n.10. We argued that the Court's affirmation of the expectation of privacy in luggage refuted Bronstein's reasoning that there is no expectation of privacy in luggage transported by plane. We note that *Waltzer* apparently abandoned reliance on *Bronstein's* reduced expectation on privacy rationale. *See* 682 F.2d at 373.

In *People v. Mayberry*, 31 Cal. 3d 335, 341-42 (1982), the California Supreme Court upheld a conviction based on evidence obtained through a dragnet canine sniffing investigation of luggage. In so doing, the Court disapproved two appellate court opinions cited in *Beale I*, *see* 674 F.2d at 1335 n.18, *People v. Lester*, 101 Cal. App. 3d 613, 161 Cal. Rptr. 703, *cert. denied*, 449 U.S. 919 (1980), and *People v. Furman*, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973), to the extent that these opinions upheld a requirement of reasonable suspicion prior to a canine investigation. *See* 31 Cal. 3d at 339-40.

[4]*See, e.g., United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 3543 (1983); *United States v. Goldstein*, 635 F.2d 356, 360-61 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); *People v. Mayberry*, 31 Cal. 3d 335, 341 (1982).

"plain smell" and a dog's detection of the escaping odor of contraband, and the related argument that the dog's senses merely "enhance" the senses of the police.[5] We expressly considered and rejected these arguments in *Beale I* and need not pursue further rebuttal here.[6]

In holding that canine investigations *do* fit within the parameters of the Fourth Amendment, *Beale I* has been criticized for failing to fall in line with the bulk of authority. *See People v. Mayberry*, 31 Cal. 3d 335, 340 (1092). Despite the general proffer of arguments tending to exclude canine investigations from Fourth Amendment control, no federal court has yet upheld a canine investigation in the face of a record demonstrating a *lack* of prior individualized suspicion.[7] Several courts have expressly noted the existence of prior suspicion in affirming the validity of the sniff,[8] and some have stressed that the court

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[5]*See, e.g., Horton v. Goose Creek Independent School District*, 690 F.2d 470, 477 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 3536 (1983); *United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir.), *cert. denied*, 450 U.S. 923 (1980).

[6]We rejected the "airspace" argument at 674 F.2d at 1333-34. The physical penetration test to determine Fourth Amendment coverage of police investigative activities has long been abandoned. *Katz v. United States*, 389 U.S. 347, 352-53 (1967). We rejected the "plain smell" arguments at 674 F.2d at 1332-33. *See also* 1 W. LeFavre, *Search and Seizure: A Treatise on the Fourth Amendment*, 283-84 (1978).

[7]*In United States v. Race*, 529 F.2d 12 (1st Cir. 1976), the First Circuit upheld a dragnet canine inspection of a warehouse containing commingled domestic and international freight. *Id.* at 14 & n.2. *Race* is distinguishable, however, as involving a customs inspection in which traditional Fourth Amendment constraints are extremely relaxed. *See United States v. Odland*, 502 F.2d 148, 151 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *Klein v. United States*, 472 F.2d 847, 849 (9th Cir. 1973).

[8]*See, e.g., United States v. Goldstein*, 635 F.2d 356, 362 n.10 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980); *United States v. Sullivan*, 625 F.2d 9, 11-12 (4th Cir.), *cert. denied*, 450 U.S. 923 (1980).

was not confronted with an indiscriminate "dragnet" type of investigation.[9] We have little doubt that if faced with the dragnet sniffing of human beings for evidence of crime, most of our brothers would join in outrage at the egregious violation of the reasonable expectation of privacy in one's body.[10] The effect of holding that a canine sniff investigation requires no articulable suspicion in circumstances in which the luggage is not detained, even briefly, in order that the investigation be performed, would be to encourage the indiscriminate use of roving trained dogs at public airports. We decline to reach this result.[11]

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[9]*See, e.g., United States v. Klein,* 626 F.2d 22, 27 (7th Cir. 1980); *United States v. Bronstein,* 521 F.2d 459, 463 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976).

[10]The Fifth Circuit, in *Horton v. Goose Creek Independent School District,* 690 F.2d 470 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 3536 (1983), held that the sniffing of students constituted a "search" requiring prior individualized suspicion. *Id.* at 479. In so holding, *Horton* implicitly disapproved *Doe v. Renfrow,* 631 F.2d 91, 92 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022 (1981), in which the Seventh Circuit held that the sniffing of students was not a "search" under the Fourth Amendment. The *Horton* court noted that *Renfrow* has been universally criticized by the commentators. 690 F.2d at 478 & n.14. In establishing a requirement of prior suspicion, *Horton* stressed the intrusive manner in which the dogs sniffed the students: "sniffing around each child, putting [the dog's] nose *on* the child and scratching and manifesting other signs of excitement in the case of an alert . . . ." *Id.* at 479 (emphasis in original). *See also United States v. Bronstein,* 521 F.2d 459, 462 n.5 (2d Cir. 1975) (observing that the court was not presented with the issue of a personal search but upheld only a canine search of luggage), *cert. denied,* 424 U.S. 918 (1976).

[11]As we stated in *Beale I,* we do not intend any dilution of Fourth Amendment rights through application of a "sliding-scale" of Fourth Amendment protections. 674 F.2d at 1335-36 n.20, *quoting* Amsterdam, *supra,* at 393. We approve a reduced standard of Fourth Amendment protection as an eminently justifiable preference to the "all or nothing" alternatives: The imposition of probable cause and warrant requirements to the kind of canine investigation at issue

The selectivity and other unintrusive aspects of canine investigations of luggage do not exempt the process from Fourth Amendment scrutiny but, rather, make application of the traditional probable cause and warrant requirements unnecessary to protect the privacy rights of those travelers whose luggage is under investigation. The majority of courts that have addressed the dog sniffing question have confused the relative unintrusiveness of the investigation with its eligibililty for inclusion within the scope of the Fourth Amendment. The unintrusiveness of a search does not reduce, or have any effect on, the basic expectation of privacy in the thing searched. In *Beale I,* we held simply that articulable, individual suspicion renders the sniffing of personal luggage, located in an airport, *reasonable* under the Fourth Amendment. It may be that, although the expectation of privacy in luggage is one of the highest order, *see generally United States v. Chadwick,* 433 U.S. 1 (1977), the greater intrusiveness occasioned by the sniffing of human beings calls for a higher degree of antecedent suspicion than that necessary for a sniff of luggage.

We adhere to our position in *Beale I* in the belief that it presents a coherent framework for judicial oversight of canine investigations. Rather than follow an illogical approach of ignoring the source of the judicial authority to establish reasonable restraints on canine investigations, we think it infinitely more sensible to recognize that the scope of the Fourth Amendment encompasses this investigative technique. Moreover, the restraint adopted here is the

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would far exceed the protection warranted by the intrusion, while "[n]othing would invoke the spectre of a totalitarian police state as much as the indiscriminate, blanket use of trained dogs at roadblocks, airports, and train stations." *Id.*

eminently reasonable one of simply requiring that before using a trained dog to investigate the very private contents of personal luggage for evidence of crime, the police have *some articulable reason,* not necessarily amounting to probable cause, to suspect that the luggage may contain contraband.

Because the district court concluded that no showing of prior suspicion was required to validate the sniff of Beale's luggage, we remand to the district court to make the necessary factual determination. If the district court finds that the Fort Lauderdale investigation was supported by articulable, founded suspicion, then the district court would be correct in its prior ruling that "probable cause for [Beale's] arrest was established by the narcotic dog's actions in Florida, followed up by the narcotic dog alerting again in San Diego." Reporter's Transcript at 77.

If, however, the district court finds that the Fort Lauderdale intrusion was based on a constitutionally deficient level of suspicion, it must revise its probable cause determination concerning Beale's arrest and the issuance of the search warrant in San Diego, excluding evidence tainted by the Florida dog sniffing.[12]

The judgment of conviction is therefore

VACATED AND REMANDED, WITH DIRECTIONS

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[12]*See Wong Sun v. United States,* 371 U.S. 471 (1063).

UNITED STATES V. BEALE, NO. 80-1652

REINHARDT, Circuit Judge, dissenting:

I dissent most reluctantly. I do so only because I believe that *United States v. Place,* 462 U.S. ____, 103 S.Ct. 2637 (1983), leaves me no alternative.

Prior to *Place,* Judge Ely wrote an excellent, well-reasoned, and scholarly opinion, in which I readily concurred, holding that a dog sniff of luggage constitutes a Fourth Amendment intrusion. *United States v. Beale,* 674 F.2d 1327 (9th Cir. 1982). I agreed with Judge Ely that under our Constitution, law enforcement officials could not simply, without any justification, use dogs to sniff luggage or other containers designed to hold personal and private articles. Accordingly, we adopted a standard requiring "founded" or "articulable" suspicion before such an invasion of constitutionally protected interests could occur. Since then, however, it seems to me that the Supreme Court has made it clear in *Place* that it does not agree that the Constitution affords citizens as much protection as we thought it did.

I agree with the majority that we should follow the Supreme Court's statements in *Place* regarding dog sniffing, even though they may be dictum. I also agree that the critical language is the following:

> [W]e conclude that the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the meaning of the Fourth Amendment.

103 S.Ct. at 2644-45.

My only disagreement with the majority is over the effect of the Supreme Court's language. I think it leaves no room for application of the Fourth Amendment to dog sniffs of luggage located in a public place.[1] While the term "search" is flexible and may refer to a "full blown search" or a "limited search", i.e., a simple pat down, there still must be a "search" or a "seizure" before a Fourth Amendment violation can occur. *See Terry v. Ohio,* 392 U.S. 1, 19, 24-25 (1968). Thus, I believe that we cannot require "founded" or "articulable" suspicion before a dog sniff of luggage located in a public place may be conducted.

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Oct 24 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

[1]Certainly *Place* does not authorize the use by law enforcement officials of dogs to sniff persons. As we said in our earlier *Beale* opinion, such use of dogs "is normally inconsistent with the concepts embodied in our Constitution." 674 F.2d at 1336 n.20. I do not believe that *Place* in any way requires us to change that view.

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No. 84-404

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN CHRISTOPHER BEALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment requires that law enforcement officials have a reasonable suspicion that luggage contains contraband before it can be exposed to a sniff test by a trained narcotics detection dog.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 736 F.2d 1289. The court's prior decision (Pet. App. 15a-34a) is reported at 674 F.2d 1327.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1984. The petition for a writ of certiorari was filed on August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his suppression motion, petitioner was convicted at a bench trial on stipulated facts in the United States District Court for the Southern District of California of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to concurrent terms of 30 months' imprisonment on each count, to be followed by a seven-year special parole term. The court of appeals reversed the conviction on the ground that the district court erred in denying the suppression motion (Pet. App. 15a-34a). This Court vacated the judgment and remanded the case for further consideration in light of *United States* v. *Place*, No. 81-1617 (June 20, 1983). No. 82-674 (June 27, 1983). A panel of the court of appeals ordered the case remanded to the district court to determine whether there was reasonable suspicion (Pet. App. 37a-49a), but the court of appeals granted rehearing en banc and affirmed petitioner's conviction (*id.* at 1a-13a).

1. Evidence adduced at a suppression hearing showed that on April 17, 1980, Detective Rick Berks and Deputy Larry Burk of the Broward County, Florida, Sheriff's Department were assigned to the airport narcotics interdiction detail at the Fort Lauderdale Airport.[1] While watching passengers in the vicinity of the National Airlines terminal, Detective Berks observed petitioner and co-defendant Joseph Pulvano[2] leave a taxicab, check three pieces of luggage including a large maroon suitcase, and enter the terminal together. Upon reaching a security checkpoint inside, the two men separated and independently approached the ticket counter, but then sat together in the boarding area. After observing this behavior, Detective Berks determined that the two men had obtained separate seating assignments on a National Airlines flight to San Diego, California, with a change of planes in Houston, Texas.

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[1]Petitioner's trial consisted of the filing of a stipulation ("Stip.") by the parties to certain facts developed during the suppression hearing, which was made a part of the trial record. The guilty verdict by the court was entered on the basis of the stipulated facts (Tr. 80-82).

[2]Pulvano pled guilty to a conspiracy charge following the denial of his suppression motion (Tr. 80) and was not a party on appeal.

Detective Berks also examined the labels on the defendants' luggage and noticed that Pulvano was watching him while he examined the bags (Pet. App. 16a; Tr. 6-7; Stip. 2-3).

Detective Berks then approached the two men, identified himself, and asked whether they objected to answering a few questions. When they responded that they did not, the officer explained that they were not under arrest, but asked to see their identification and inquired whether either of them had ever been arrested. Petitioner displayed a New Jersey driver's licence; Pulvano, who appeared extremely nervous, stated that his identification was in his suitcase and that he had been arrested on a narcotics charge six years earlier. Detective Berks then thanked them for their cooperation and walked to the other side of the boarding area. Approximately five minutes later, Pulvano approached Detective Berks and inquired whether anything was wrong. The officer responded that there was no problem at that time (Pet. App. 17a; Tr. 8-10; Stip. 3).

While Detective Berks was speaking with petitioner and Pulvano, Officer Burk obtained a trained narcotics detection dog. After Detective Berks concluded his converstion with the defendants, the officers went to the baggage loading ramp adjacent to the National Airlines ticket counter, which contained the baggage that petitioner and Pulvano had checked. The dog immediately "alerted" to petitioner's large maroon suitcase, indicating that it contained narcotics (Pet. App. 17a; Tr. 10-11; Stip. 3).

The officers then requested a computer check on the two men, which revealed that Pulvano had been arrested and convicted about six months before for possession of cocaine. Detective Berks then telephoned law enforcement officials at the airports in Houston, Texas, and San Diego, California, notifying them of the events that had transpired (App. 17a; Tr. 12-13; Stip. 3-4). Police officers in Houston

kept petitioner and Pulvano under surveillance as they changed planes there, observing that the two men acted as though they were traveling separately (Pet. App. 17a; Tr. 14; Stip 4).

When the two men deplaned in San Diego they were again observed by law enforcement officers, who noted that they did not appear to be traveling together and behaved as though they feared surveillance. As they reached the front of the terminal, Pulvano stopped at a telephone; petitioner walked directly to a taxi without making any effort to retreive his luggage (Pet. App. 18a; Tr. 49-50; Stip. 5). Police officers then approached petitioner and asked him about his luggage. In response, he stated falsely that he was traveling alone and that he had lost his claim ticket. Thereupon, the officers advised him that he was under arrest and escorted him back to the terminal (Pet. App. 18a; Tr. 50-53; Stip. 5-6).

While petitioner and Pulvano were under surveillance, other officers took a trained narcotics detection dog to the baggage claim area, and this dog also alerted to petitioner's large maroon suitcase (Pet. App. 18a; Tr. 29; Stip. 6-7). Shortly thereafter, the officers observed Pulvano retrieve the bags from the luggage carousel and proceed toward the nearest exit. The officers then stopped him and escorted him to the airport Narcotics Task Force Office, where he consented to a search of all the bags except the maroon suitcase (Pet. App. 18a; Tr. 30-32; Stip. 7). Subsequently, when petitioner arrived at the Narcotics Task Force Office, the dog also alerted to the shoulder bag that petitioner had been carrying (Pet. App. 18a; Tr. 63-64; Stip. 8).

Based on this information, the police obtained a warrant from a state court judge to search the two suitcases to which the dog had alerted. The ensuing search revealed that petitioner's shoulder bag contained approximately one kilogram of cocaine and that the maroon suitcase contained

approximately 137 grams of marijuana (Pet. App. 18a; Tr. 35; Stip. 8).

2. The district court denied the motions of petitioner and Pulvano to suppress the evidence obtained as the result of these searches (Tr. 72-78). The court rejected the contention that probable cause was required for the police at the Fort Lauderdale Airport either to remove the bags from the airline luggage rack or to expose them to a narcotics detection dog, explaining that "the present state of the law is that the dog search in Fort Lauderdale and here is not a search under the Fou[illegible]h Amendment" (Pet. App. 18a; Tr. 72).

The court of appeals reversed (Pet. App. 15a-34a). The court held that "the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage *is* a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause." *Id.* at 31a-32a (footnote omitted). Accordingly, the court of appeals remanded the case to the district court for a determination whether the officers who exposed respondent's luggage to a dog sniff at the Fort Lauderdale airport possessed a reasonable suspicion that it contained contraband (*id.* at 33a-34a).

Thereafter, this Court, on the government's petition (No. 82-674), vacated the judgment of the court of appeals and remanded the case for further consideration in light of *United States* v. *Place*, No. 81-1617 (June 20, 1983). On remand, the court of appeals adhered to its prior decision (Pet. App. 37a-49a). The panel construed this Court's decision in *Place* permitting dog sniffs as limited to the situation where there was sufficient suspicion to warrant detention of the luggage (*id.* at 42a). Judge Reinhardt dissented (*id.* at 48a-49a). He agreed in principle with the majority's view,

but found that the Court's decision in *Place* was dispositive, leaving "no room for application of the Fourth Amendment to dog sniffs of luggage located in a public place" (*id.* at 49a).

The en banc court vacated the panel decision (Pet App. 1a-13a). Relying on *United States* v. *Place, supra*, and *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), it held that a luggage sniff by a trained narcotics dog does not constitute a "search" within the meaning of the Fourth Amendment. The court therefore affirmed the original judgment of conviction. Judge Pregerson dissented (Pet. App. 7a-13a).

ARGUMENT

1. Petitioner contends (Pet. 6-13), that the Fourth Amendment applies to canine sniffs of luggage and that reasonable suspicion is required before luggage can be subjected to a sniff test by a narcotics detection dog. As the en banc court below recognized, this argument is completely foreclosed by this Court's recent decisions in *Jacobsen* and *Place*.

In *Place*, the Court unequivocally stated that a sniff of luggage by a trained dog "did not constitute a 'search' within the meaning at the Fourth Amendment." Slip op. 11. In *Jacobsen*, the Court held that a chemical test that discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. The Court relied heavily on *Place* in reaching this result. The Court specifically noted that *Place* "held that subjecting luggage to a 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment." *Jacobsen*, slip op. 13-14. The Court further explained that the reason for this holding was that the dog sniff "did not intrude upon any legitimate privacy interest [of the defendant because] the governmental conduct could

reveal nothing about noncontraband items." *Id.* at 14 n.24. This view has been accepted by every court of appeals to consider the question. See, *e.g.*, *United States* v. *Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982), cert. denied, 463 U.S. 1210 (1983); *United States* v. *Goldstein*, 635 F.2d 356, 360-361 (5th Cir.), cert. denied, 452 U.S. 962 (1981). In light of this Court's authoritative holdings in *Place* and *Jacobsen*, petitioner's argument that the dog sniff test conducted in this case somehow constitutes a "search" within the meaning of the Fourth Amendment and could not be conducted in the absence of reasonable suspicion is no longer tenable.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

NOVEMBER 1984

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[3] *Katz* v. *United States*, 389 U.S. 347 (1967), plainly has no application here (cf. Pet. 9-10). Unlike a private telephone conversation, an individual has no legitimate expectation of privacy in the odors that inevitably escape from his luggage when he leaves it in a public place. Furthermore, as noted in *Place*, slip op. 10-11, and *Jacobsen*, slip op. 14 n.24, unlike the wiretap, which indiscriminately reveals all the contents of an individual's personal phone conversation, the sniff test discloses only the presence or absence of contraband, not any other information about the contents of the luggage.